POOR COPY

Table of Authorities Cited

Cases	Pages
Hain v. Mattes (1905) 34 Colo. 345, 83 Pac. 127	3
Marshall Silver Min. Co. v. Kirtley (1889) 12 Colo. 410, 21 Pac. 492	3
Pennsylvania Min. Co. of Colorado v. Bales (1902) 18 Colo. App. 108, 70 Pac. 444	3
Providence Gold-Min. Co. v. Marks (1900) 7 Ariz. 74, 60 Pac. 938	3
Retzer v. Wood (1883) 109 U.S. 185	4
Richmond Mining Company v. Rose (1884) 114 U.S. 576	3
Upton v. McLaughlin (1881) 105 U.S. 640	4

Statutes	
Act of May 10, 1872; 17 Stat. 91, 93; 30 U.S.C. 29, 30	2, 3
Act of March 2, 1907; 34 Stat. 1243; 48 U.S.C. 384	2
Act of June 7, 1910; 36 Stat. 459; 48 U.S.C. 386	2
Act of May 31, 1938; 52 Stat. 588; 48 U.S.C. 381	2

POOR COPY

BLEED THROUGH

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 489

UNITED STATES SMELTING REFINING AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom, deceased, and WALTER JENSEN,
Petitioners,

vs.

EMMA GRACE LOWE,
Respondent.

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

Respondent's arguments *ad hominem* and disclaimed pleas for sympathy are no more relevant to the matter in hand than would be a statement by petitioners that

respondent was an habitual claim jumper doing her prospecting in the local recorder's office. An important and substantive matter of law remains to be answered, and such arguments neither gainsay this fact nor contribute to the solution.

Respondent's answers to petitioners' argument (Resp. Br., pp. 9-17, 17-24, 24-29) are amply covered in the Petition (pp. 8-10, 11-13, 13-15) and require no further consideration.

Her "ADDITIONAL REASON WHY CERTIORARI SHOULD BE DENIED" (Resp. Br., pp. 29-33), however, is one which petitioners have not previously had an opportunity to discuss. Assuming that the 1938 Act repealed the burden of proof provision of the Waskey Act, respondent contends that the 1938 Act also repealed the Act of June 7, 1910 (36 Stat. 459, 48 U.S.C. 386), which extended in Alaska the time in which to file adverse claims and suits beyond the time allowed in the United States by the Act of May 10, 1872 (17 Stat. 91, 93), as amended (30 U.S.C. 29, 30).

In addition to the fact that this contention has nothing to do with the repeal of the burden of proof provision of the Waskey Act, which is the question before this court, respondent is clearly without right to raise it now almost four years after the complaints were filed and more than two years after the trial. Although the times of filing the adverse claims in the Land Office were stated in the complaints (R. 4, 9) and the dates of filing the complaints were endorsed on them (R. 5, 10), respondent did not move against them, demur or raise the point in her answers (R.

POOR COPY

BLEED THROUGH

10, 20). She did not raise it during the trial or in the Assignment of Errors (R. 75), in the Bill of Exceptions (R. 87) or in the Statement of Points to be Relied Upon in the Court of Appeals (R. 167).

Respondent injected the question of the time for filing into these proceedings for the first time in her reply brief on appeal to the Court of Appeals. The weight which that court gave to this point is indicated by the complete absence of any reference to it in the court's opinion (R. 174; 175 F.2d 486), and respondent has failed to file a cross petition for a writ of certiorari raising the question.

The precise point, whether the failure to file an adverse claim or suit within the time allowed by 30 U.S.C. 29, 30, may be raised for the first time on appeal, has been decided in the negative by the Supreme Courts of Arizona and Colorado.

Hain v. Mattes (1905) 34 Colo. 345, 83 Pac. 127;

Pennsylvania Min. Co. of Colorado v. Bales (1902) 18 Colo. App. 108, 70 Pac. 444;

Providence Gold-Min. Co. v. Marks (1900) 7 Ariz. 74, 60 Pac. 938;

Marshall Silver Min. Co. v. Kirtley (1889) 12 Colo. 410, 21 Pac. 492.

Exactly the same answer was given by this court as an alternative basis for decision in *Richmond Mining Company v. Rose* (1884) 114 U.S. 576.

The statute fixing the time in which to file adverse claims and suits is a statute of limitations. It does not go to the jurisdiction of the trial court and may be waived by the

person entitled to claim its benefits. Having waived the statute in the trial court, respondent is not entitled to raise it on appeal.

Retzer v. Wood (1883) 109 U.S. 185;
Upton v. McLaughlin (1881) 105 U.S. 640.

For the foregoing reasons, because of the importance of the burden of proof question in this case as a matter of statutory construction, and because of its importance to the future development of Alaskan mines, which constitute the second largest industry of the Territory, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
January 26, 1950.

Respectfully submitted,
SOUTHALL R. PFUND,
Attorney for United States Smelting Refining and Mining Company, a corporation, First National Bank of Fairbanks, Executor of the Estate of Gustaf Soderblom, deceased, and Walter Jensen, Petitioners.

PILLSBURY, MADISON & SUTRO,
ALLAN R. MOLTZEN,
Of Counsel.

POOR COPY